No. 3552

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. L. COBB, as Trustee of the CRAIG LUMBER CO., Bankrupt, and THE BANK OF ALASKA,
Appellants,

vs.

HILLS-CORBET COMPANY, a Corporation, Composed of F. R. HILLS and W. W. CORBET,
Appellees.

BRIEF FOR THE APPELLANTS.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

J. H. COBB and
J. B. MARSHALL,
Attorneys for Appellants.

IN THE

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HILLS-CORBET CO., a Corporation Composed of F. R. HILLS and W. W. CORBET,

Appellees.

Brief for the Appellants.

STATEMENT OF THE CASE.

We think the questions arising in this appeal can be best presented by a statement in chronological order of the facts upon which they arise.

1st. On October 31st, 1917, the Craig Lumber Co. and the Hills-Corbet Co., Appellees, made and entered into a contract to build and equip a sawmill, which reads as follows:

"THIS AGREEMENT, by and between, Hills-Corbet Company, of Seattle, Wash., hereinafter called the Company, and the CRAIG LUMBER COMPANY, of Craig, Alaska, hereinafter called the Purchaser,

"The Company agrees to furnish all Machinery, Belt, Saws, Pipe and Pipe Fittings, Blow Pipe and Fittings and Iron necessary to equip a saw-mill at Craig, Alaska, in accordance with the attached specifications and drawings, which specifications and drawings become a part of this agreement.

"The above equipment to be billed F. O. B. ships tackle, Seattle, Wash.

"The Company also agrees to build buildings above pile foundations, install machinery, put on belting, install piping and turn the Mill over to the Purchaser ready to run according to the attached drawings and specifications. The Purchaser is to drive all Piles.

"The Purchaser agrees to properly care for all apparatus and material delivered until the same is fully paid for, and to hold the Company harmless against the payment of any taxes assessed against the apparatus and material after it shall have been shipped. The Company shall keep the property, herein agreed to be sold, fully insured against damages or loss by fire, and to carry marine and casualty insurance for the benefit of the Company and the Purchaser as their interest may appear, but in so insuring the property, the Company shall only be held liable for the exercise of a reasonable judg-

ment in the selection of Insurance Company or Insurance Companies, with which it places the risk.

"The Company agrees to use all possible diligence in prosecution of the work and to expedite the delivery and installation of machinery to the best of its ability. The Company is not in any event to be held liable for loss, damage, detention, or delay caused by fire, strikes, lockouts, civil or military authority, or insurrection or riot, action of the elements, forces of nature, or any other cause beyond its control, nor in any event consequential damages.

"The Purchaser agrees to pay all war taxes assessed or due on any of the material or work of whatever nature,

"If for any reason the work is discontinued or interrupted before completion, the Purchaser agrees to pay the Company within sixty days all moneys due at the time of the interruption of the work, and also all sums which have been retained by the Purchaser as a guarantee for the fulfillment of the work or for any other reason, including the company's commission and all unpaid labor charges.

"The title to the apparatus and material herein agreed to be sold, shall not pass from the Company until all payments hereinunder shall have been fully paid in cash. Upon default in any such payments the Company may re-take the property agreed to be sold. In such event the money heretofore paid by the Purchaser to the Company shall be presumed to be the amount of damages sustained

by the breach of this Agreement and shall be retained by the Company as liquidated damages for the breach.

"The Purchaser agrees to pay to the Company actual cost of all labor, machinery, equipment and building material used in connection with the work (lumber and piles excluded), the cost of insurance and all costs except freight and transportation charges of material and men from Seattle, Wash. to Craig, Alaska, plus ten (10%) per cent. It being agreed that the Purchaser is to furnish all wood building material and to pay the freight and all transportation charges of material and men from Seattle, Wash., to Craig, Alaska.

"It is agreed that the cost of machinery, material and equipment is to be the cost F. O. B. ships tackle, Seattle, Wash., plus fifteen (15%) per cent to cover the operation expenses of the Company. The cost of labor is to be the actual cost to the Company.

"It is agreed that the Purchaser will pay to the Company fifty (50%) per cent of the cost of all machinery, material and equipment upon presentation of invoices with shipping papers, twenty-five (25%) per cent in forty days from due date of first payment and balance in thirty (30) days from completion of contract. The invoice to include the ten (10%) per cent profit to the Company. Labor charges are to be paid in full by the Purchaser every month upon presentation of a bill by the Company which shall not include the ten (10%) per cent profit to the Company. The ten (10%)

per cent profit to be paid in thirty (30) days from completion of contract.

"It is agreed that the Purchaser has the right at any time to examine the books and requisitions of the Company to ascertain the cost of material, machinery and equipment purchased by them.

"It is agreed that the cost of the mill complete as per specifications and drawings will not exceed the estimate of thirty-two thousand one hundred and twenty-five & 00/100 ($32,125.00) Dollars.

"It is agreed that the Company will do the work in a workmanlike manner and when the installation is completed it will be ready for the operation and will be left in good running order." (Rec. 5–9.)

The "drawings" referred to in the contract is Plaintiff's Exhibit "A" (not printed) and are the ordinary drawings of a building giving its dimensions, the positions of the machinery, etc., to be installed, and need not be further noticed. The "specifications" referred to are found in the record, pages 9–23, and consist of an itemized statement of the machinery apparatus, and material to be furnished by appellees under the contract.

2d. At the time of the making of this contract it was contemplated that the appellees should purchase on the open market the machinery, apparatus, material, and equipment necessary to fill it, though they had on hand one piece of machinery left over from a former contract, ~~with~~ worth about eight hundred ($800.00) dollars, which they used. (Rec., pp. 110–114.)

3d. The material, machinery and equipment

called for in the contract was shipped from Seattle to Craig, Alaska, from November 15, 1917, to May 29th, 1918, inclusive. In the same period other goods not embraced in the contract, amounting to five thousand nine hundred fifty-eight dollars and seventy-nine cents ($5,958.79) were purchased and shipped by appellees to the Craig Lumber Company. The appellees in each instance charged the Craig Lumber Company with the cost of the goods, whether purchased to fill the contract or otherwise, plus fifteen (15%) per cent; and the charges were all made upon one open account, and all payments made by the Craig Lumber Company were credited upon this one account, in so far as they were credited at all. (Rec., pp. 110–114.)

4th. When the shipment leaving Seattle November 27th, 1917, reached Craig, a part thereof consisting of brick, cement, and an electric generator, was lost through the breaking down of the dock. No question was raised as to whose loss this was, but another lot was at once sent to replace the loss, and both lots charged to the Craig Lumber Company.

5th. Some time about the first of December, 1917, one F. A. Cloudy, as the agent and representative of Hills-Corbet Company, proceeded to Craig, Alaska, with a force of men, for the purpose of constructing the buildings and installing the machinery under the contract. The Hills-Corbet Company employees were all boarded by the Craig Lumber Company, it having already built and equipped a boarding-house at the mill. It seems

that when the first month's wages became due, Hills-Corbet Company failed to furnish Cloudy funds to pay, and the men threatened to quit. The Craig Lumber Company paid to Hills-Corbet Company through Cloudy on January 5th, 1918, a check for three thousand five hundred ($3,500) dollars (Rec. 237, 238); on January 24th, 1918, another check for three thousand five hundred ($3,500) dollars, and on March 26th, 1918, a third check for three thousand five hundred ($3,500) dollars (Rec., pp. ——.) These three checks aggregating then thousand five hundred ($10,500.00) dollars were deposited in the Bank of Alaska at Wrangell, and their proceeds checked out by F. A. Cloudy as the agent of Hills-Corbet Company. In addition to the said sum of ten thousand five hundred ($10,500.00) dollars, the proceeds of said three checks, Cloudy, as agent of Hills-Corbet Company, drew checks on the Bank of Alaska at Wrangell for the sum of six thousand ($6,000.00) dollars or thereabouts, which were paid by the bank out of funds of the Craig Lumber Company. This latter amount is of no particular importance to the solution of the questions involved; the point is that the three checks, aggregating ten thousand five hundred ($10,500.00) dollars *were paid on the contract.* (Rec., p. 152.)

6th. The Craig Lumber Company boarded the employees of Hills-Corbet Company while they were at work on the contract, at a cost of three thousand three hundred and twenty-four ($3,324.00) dollars. (Rec., pp. 217–220.)

7th. In addition to the moneys paid by the Craig Lumber Company to Hills-Corbet Company through Cloudy, the Lumber Company also paid directly to Hills-Corbet Company the following sums:

Dec. 8th, 1917	$4,020.44
Dec. 17th, 1917	3,812.23
Jan. 24, 1918	11.56
Feb. 1st, 1918	4,461.63
Feb. 20th, 1918	276.51
March 5th, 1918	361.45
March 18, 1918	5,000.00
July 19, 1918	1,000.00
Dec. 8, 1918	1,000.00
	$19,943.82

(Rec., p. 44.)

The first two of the above payments were expressly made on the contract, as no "extras" had at said dates been ordered. All said payments were credited by the Hills-Corbet Company upon the general open account, which included the entire business, both the contract and the "extras." (Rec., pp. 113, 114.)

8th. The total amount of money then paid by the Lumber Company to Hills-Corbet Company, including board of its men, was upward of thirty-nine thousand nine hundred ($39,900.00) dollars; the cost of the mill building, machinery, and equipment was fixed by the contract at not to exceed thirty-two thousand one hundred and fifty ($32,150.00), and the total value of the "extras" ordered was five thousand nine hundred fifty-eight dollars and

seventy-nine cents ($5,958.79); so that the cost of the mill and extras was more than covered by the payments aforesaid; *but of the moneys paid to Hills-Corbet Company through Cloudy, Cloudy advanced or paid out for the Lumber Company some six thousand ($6,000.00) dollars or seven thousand ($7,000.00) dollars, as wages to the employees of the Lumber Company.* (Rec., pp. 144–152.)

9th. On Feb. 25th, 1919, the petition in bankruptcy was filed and the Craig Lumber Company adjudged bankrupt on March 19th, 1919.

10th. On July 19th, 1919, the Hills-Corbet Company filed its petition in the Bankruptcy Court setting up said building contract, alleging it to be conditional sale, a copy of which with bill of particulars was attached to the petition as a part thereof, a balance alleged due on the purchase money of the machinery and equipment of twelve thousand nine hundred eighty dollars and thirty-six cents ($12,980.36), and praying for an order on the trustee in bankruptcy to deliver the machinery, etc., to them. (Rec., pp. 1–45.)

11th. The trustee demurred to the petition on the ground substantially that the petition, with exhibits attached, showed that the contract was not a conditional sale, and that petitioners were not the owners of the property, and not entitled to its return. (Rec., pp. 46, 47.)

12th. The referee sustained the demurrer in a short opinion which seems to us conclusive of this question. (Rec., pp. 48–51.)

13th. Hills-Corbet Co. petitioned the District Court for a review of the referee's decision (pp. 52–55), and the District Judge reversed the decision of the referee. (Rec., pp. 56–59.)

14th. The trustee thereupon filed his answer denying all the material allegations of the petition and affirmatively pleading that the machinery, etc., was the property of the bankrupt; that it was purchased for it by petitioners, as its brokers and agents; further plead payment in full; and further set up that it was contemplated at the time of the making of the contract that the machinery, etc., mentioned therein should be attached to and become a part of the mill building and realty of the Craig Lumber Company; that it was so attached and now is a part of the realty; and the Bank of Alaska, a valid creditor of the Craig Lumber Company, has a mortgage on the said realty to secure a valid debt of about $50,000.00 and took said mortgage without notice of the alleged claim of said petitioners. (Rec., pp. 59–62.)

The allegations of the answer were put in issue by the reply of petitioners. (Rec., pp. 63, 64.)

15th. The following stipulation was then made and filed:

"This agreement and stipulation made this 19th day of January, 1920, by and between Hills-Corbet Company of Seattle, Washington, hereinafter called the Company, Bank of Alaska, hereinafter called the Bank, and E. L. Cobb, Trustee in Bankruptcy, in the matter of Craig Lumber Company, bankrupt, hereinafter called the Trustee, Witnesseth, that—

"Whereas, the company has filed before H. B. Le Fevre, referee in bankruptcy in the matter of Craig Lumber Company, bankrupt, a petition praying for the return to it of certain sawmill machinery and other property now in possession of the trustee; and

"Whereas, the company claims to own said property under and by virtue of a contract attached to said petition upon the ground that payments under said contract have never been fully made; and

"Whereas, the bank desires to foreclose said mortgage and make a sale of the real estate and the machinery and property now situated thereon as a whole prior to the decision of the referee or the District Court for the District of Alaska, Division No. 1, upon the controversy between the parties thereto:

"Now, therefore, it is agreed between the parties hereto as follows:

"1. That the bank shall sell the machinery and other property claimed by the company and shall account therefor as follows: The bank shall deliver to the company a bond in the penal sum of Twelve Thousand ($12,000.00) Dollars executed by the bank as principal and the United States Fidelity and Guaranty Company, a corporation, of Baltimore, Maryland, as surety, conditioned that the bank shall pay to the company such sum of money as shall be found by the United States District Court for the Territory of Alaska, Division No. 1, or by a higher court in case of appeal or review, to be due the company under and by virtue of the contract relied

on by said company in their petition, providing the final judgment of the United States District Court for the Territory of Alaska, or any other higher court upon appeal or review, shall sustain the rights of the company as against the rights of the Bank in and to the said machinery and property. Said bond shall contain a provision that judgment thereon may be rendered by said court or courts upon the determination of the controversy herein referred to.

"2. The bank consents to be bound by the final judgment in the controversy over the said machinery and property whether the final judgment be rendered by the District Court for the Territory of Alaska, Division No. 1, or by a higher court on appeal, and to that end hereby enters its appearance in this action for that purpose.

"3. That the issues of law and fact raised by the petition of the company and the answer of the trustee be returned to the United States District Court for the Territory of Alaska, Division No. 1, for hearing and decision and to that end that the said District Court enter an order in this cause directing the return by the referee to the clerk of said court of all of the pleadings, papers, files and entries filed with or made by the referee in the controversy referred to for the determination of said issues in the first instance by the said District Court.

"4. That this stipulation and agreement shall not be binding or effective for any purpose until the bond referred to in paragraph one shall be executed and approved by Newark L. Burton or

Frank P. Helsell, attorneys for the company, and until the said District Court enters an order approving this stipulation and an order as mentioned in paragraph 3 hereof." (Rec., pp. 65–67.)

The stipulation was approved by the court (Rec., p. 68); an order for the hearing before the District Judge was made (Rec., p. 68); the Bank of Alaska gave the bond as per the stipulation (Rec., p. 69).

16th. The matter came on for hearing before the Court, and the Court made findings of fact and conclusions of law in favor of petitioners, and rendered judgment in favor of petitioners and against the Bank of Alaska for the sum of $9,827.39 with 8 per cent interest from July 1st, 1918, and costs. (Rec., pp. 72–82.)

The trustee and the Bank of Alaska thereupon removed the cause into this court for correction and revision upon the following

ASSIGNMENTS OF ERROR.

Now comes E. L. Cobb, as trustee of the Craig Lumber Co., a corporation, bankrupt, and the Bank of Alaska, a corporation, and assigns the following errors committed by the Court during the trial and in the rendition of the judgment and decree in the above-entitled matter, and upon which they will rely in the Appellant Court:

I.

The Court erred in reversing the ruling of the referee, sustaining the demurrer to the petition of appellees and in overruling said demurrer.

II.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The contract, a copy of which is attached to the petition of the Hills-Corbet Co, herein, was made between the Craig Lumber Co. and the Hills-Corbet Co. a copartnership, on the 31st of October, 1917.

III.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

At the time of the making of the contract the Hills-Corbet Co. had none of the machinery and material they were to furnish under the contract, except one engine worth about $800.00, and it was contemplated by both parties that they should buy such machinery and material on the open market and ship to Craig, Alaska.

IV.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Hills-Corbet Co. did so purchase the machinery and material, as required to fill the contract; the first shipment was made about November 15th, 1917. About the same time they also sent a force of men to Craig under F. A. Cloudy to put and remodel the mill buildings, and do the work of installation of machinery called for in the contract. Fifty per cent of this shipment was paid in cash by the Craig Lumber Company, as called for in the contract.

V.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Upon reaching Craig with the laborers provided to do the work, or shortly thereafter, Hills-Corbet Co. was paid $10,500.00 in three checks by the Craig Lumber Co., the proceeds of which were deposited in the Bank of Alaska to the credit of their agent F. A. Cloudy to be used in paying the wages of the employees of Hills-Corbet Co. But no arrangements were made by Hills-Corbet Co. for boarding their men, and such board was furnished by the Craig Lumber Co. at a cost to it of at least $1.50 per day per man.

VI.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The second shipment of material was made November 27th, 1917. When this shipment reached Craig, Alaska, and was unloaded on the dock, the dock gave way from the weight and a part of the shipment of between $2,000.00 and $3,000.00 in value was lost. This was at once reordered and paid for in full by the Craig Lumber Company, no question being raised as to whose goods they were, and who were to stand the loss. Fifty per cent of this shipment, in addition to the goods lost and paid for in full was also paid by the Craig Lumber Co. in accordance with the terms of the contract.

VII.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Other shipments were made from time to time, the last made being in April, 1918, but payments thereafter seem to have been made by the Craig Lumber

Co. in gross sums as money was available, without reference to the terms of payment of fifty per cent on invoices as provided in the contract.

VIII.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

In the meantime, beginning on January 23d, 1918, and ending May 29th, 1918, the Craig Lumber Company ordered from time to time of Hills-Corbet Co. other machinery and goods, not mentioned or included in the contract. Such goods and machinery Hills-Corbet Co. purchased on the market to fill the orders, and charged the Craig Lumber Company the same commission or profit they were to have for goods and machinery purchased under the contract —that is, the cost price plus fifteen per cent, plus ten per cent. These goods were denominated "Extra" in the petitioners' bill of particulars and aggregated $4,436.62, including the commission or profit. The total cost of machinery and material, including commission or profit, shipped under the contract aggregated $32,309.62. All of the goods, however, were charged by Hills-Corbet Co. to the Craig Lumber Company on an open account, and all moneys paid were credited on the same account, whether bought or paid under the contract or otherwise. The segregation shown on the bill of particulars was made for the purpose of this proceeding, and does not appear on the Hills-Corbet Company's books.

IX.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

As under the contract the total cost to the Craig Lumber Company of the work and labor done and material furnished was to be limited to $32,125.00, the total charge against the Craig Lumber Company in the said account with the Hills-Corbet Co. should be $36,746.26.

X.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The Craig Lumber Co. paid the Hills-Corbet Co. on the said account as follows:

$19,943.82, for which credit is given on the bill of particulars; three checks of $3,500.00 each, $10,-500.00, making a total of $30,443.82. But it appears from the evidence of F. A. Cloudy that $519.12 of the $10,500.00 furnished him was used in paying employees of the Craig Lumber Company and not employees of the Hills-Corbet Co. The net amount of cash paid on the account is $29,924.70. The Craig Lumber Co., however, paid out for board of the employees of the Hills-Corbet Co. while working on the contract the sum of $3,324.00; and the total credits on the account to which the Craig Lumber Co. is entitled is $33,248.70, and the amount which is owing to the Hills-Corbet Co. on the whole account is $3,497.56.

XI.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Although the contract of October 21st, 1917, was breached as to its terms by both parties thereto, during performance of its terms, and especially by the

Craig Lumber Company in not making its payments as they came due, the Hills-Corbet Company never attempted to reclaim possession, or asserted a right to reclaim possession of the machinery or equipment they furnished until after the bankruptcy proceedings were begun.

XII.

The Court erred in admitting in evidence the testimony of W. W. Corbet tending to show and upon which the Court found, that the written contract between the Hills-Corbet Co. and the Craig Lumber Co. was changed by F. J. Tromble so as to throw the cost of the board of the employees of the Hills-Corbet Co. upon the Craig Lumber Co.

XIII.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

The contract of October 31st, 1917, is not a contract of conditional sale, but a contract to build and equip a sawmill, and when Hills-Corbet Co. purchased the machinery, etc., to fill said contract they bought it for the Craig Lumber Co. and it thereupon became the property of the Craig Lumber Co.

XIV.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

But if the said machinery, equipment, etc., was ever the property of the Hills-Corbet Co., then by the terms of the contract, as construed by the parties in the course of their dealings the sale was complete, and the title passed, and the reservation of title, or attempted reservation of title in the

contract is merely a security in the nature of an equitable mortgage.

XV.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

As the sums due from the Craig Lumber Co. to the Hills-Corbet Co. for the purchase of machinery and material were the earliest payable under the contract, the payments made should be first applied to these, and as amounts paid exceed the cost of such material, machinery, etc., the property sought to be reclaimed is paid for.

XVI.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

In any view of the facts and the law, the Hills-Corbet Co. are not the owners of the property they have petitioned to have the trustee deliver to them, and their petition should be denied with costs.

XVII.

The Court erred in making the XI finding of fact reading as follows:

That the machinery covered by said contract of sale never passed under the "after-acquired" clause in the mortgage of the Bank of Alaska, one of the parties to this action, for the reason that the mortgagor never did "acquire" such machinery, the title never having passed.

XVIII.

The Court erred in making the XII finding of fact reading as follows:

That the machinery, material, etc., furnished and

delivered under said contract, including the work and labor performed thereunder and the 10% and 15% provided for in said contract as aforesaid, amount to the sum of $32,539.74, but under the contract the mill was to be built and installed for $32,125.00, therefore the Court finds the latter sum ($32,125) as being the "invoice under contract and 10% on labor."

XIX.

The Court erred in making the XIV finding of fact reading as follows:

That the total payments made is the sum of $19,-943.82; that in addition to said payment the Craig Lumber Company, debtor, is entitled to a credit of $8,312.58 which it paid out for labor for the Hills-Corbet Company under the contract, leaving a total balance of $9,827.39 due to the Hills-Corbet Company.

XX.

The Court erred in making the XVI finding of fact reading as follows:

That the evidence to the effect that the Craig Lumber Co., debtor, agreed to board the men employed by the Hills-Corbet Co. in the doing and performing of said work, is absolutely undisputed, and the Court finds that the Craig Lumber Co. did agree to board said men, assuming the indebtedness therefor.

XXI.

The Court erred in making the XVII finding of fact reading as follows:

That the total amount due the Hills-Corbet Com-

pany under the contract, after making the application of the payments to the extras and to the contract as in these findings set forth, is the sum of $9,827.39, together with interest at the rate of 8% from July 1st, 1918, said date being more than 30 days after the completion of the contract.

XXII.

The Court erred in awarding interest from July 1st, 1918, on the amount it found due, on the alleged conditional sale.

XXIII.

The Court erred in its conclusion of law numbered I, reading as follows:

That the contract of sale attached to and made a part of the complaint filed in this case is a conditional sale contract and the property covered thereby and described in the specifications attached thereto and made a part of said contract remain the property of the Hills-Corbet Company until the full purchase price is fully paid and the title to said property was not to pass until the same was fully paid for.

XXIV.

The Court erred in its conclusion of law numbered II, reading as follows:

That the machinery is so attached by bolts and screws as to be easily moved without damaging the building and, therefore, the conditional sale contract whereby the Hills-Corbet Company retain title to said machinery is in no way affected thereby.

XXV.

The Court erred in making the conclusion of law numbered III, reading as follows:

That the claim of the Bank of Alaska, one of the parties to this action, to the machinery covered by the said conditional sale contract, is without force or effect; that the machinery did not pass under the "after-acquired" clause of the mortgage, under which the said bank claims said machinery, for the reason that the mortgagor never did acquire such machinery, the title never having passed, and the title to the said machinery remained in the Hills-Corbet Co., under and by virtue of the aforesaid conditional sale contract.

XXVI.

The Court erred in its conclusion of law numbered IV, reading as follows:

That the application of payments other than those specifically applied should be and are first applied by the Court upon the unsecured indebtedness of the debtor to the Hills-Corbet Company, and the balance upon the conditional sale contract.

XXVII.

The Court erred in making the conclusion of law numbered V, reading as follows:

That the Court finds that the Hills-Corbet Company is entitled to a judgment against the Bank of Alaska and the U. S. Fidelity & Guaranty Company in the sum of $9,827.39, together with interest thereon at the rate of 8% per annum from July 1st, 1918.

XXVIII.

The Court erred in rendering any judgment whatsoever against the Bank of Alaska, and such judgment is wholly unsustained by the pleadings, the stipulation, or anything else in the record; and the record conclusively shows that there is no present liability from the said bank to the Hills-Corbet Co. and will not be until there shall be a final decision of this cause in favor of the Hills-Corbet Co.

The questions raised by the assignments of error may be summarized as follows:

1st. The Court erred in holding that the contract of October 31, 1917, between Hills-Corbet Co. and the Craig Lumber Company was a conditional sale; especially in view of the conduct of the parties under the contract.

2d. But conceding that it was a conditional contract, it was void as against the trustee under the Bankruptcy Act, and Chapter Thirty-one, Comp. Laws of Alaska, sections 740–743 and 748.

3d. The undisputed evidence showed that the Craig Lumber Co. had paid Hills-Corbet Co. *under the contract* the full contract price of the mill and equipment, and if anything was owing Hills-Corbet Co. from the Craig Lumber Co. it was for advances voluntarily made by Hills-Corbet Co. to pay employees of the Mill Company. But the Court erroneously deducted such advances from money paid on the contract, so as to make it appear that a balance was unpaid on the contract.

4th. The Court erred also in excluding the sum of $3,324.00 the cost of the board of the employees of the Hills-Corbet Co. paid by the Craig Lumber Co. from the cost of the mill, and then permitting the Hills-Corbet Co. to vary the contract by parol evidence, and recover upon a contract never plead at all.

5th. The Court erred in applying payments first to the satisfaction of the items of the general account for "extras," that is, for goods ordered in addition to those embraced in the contract of October 31, 1917.

6th. The judgment of the Court against the bank is erroneous and void because neither supported by pleadings, stipulation nor anything else in the record. There is no pleading of any kind against the bank, and under the stipulation and bond it was only to become liable on a contingency which has not yet arisen.

ARGUMENT.

In determining whether a given contract is a conditional sale, very little importance is attached by the Courts to what the parties have designated to or what they have said in the contract as to the intention that the title should not pass. Every such contract must be examined and construed as a whole and all its terms and conditions harmonized, if possible, and the intentions of the parties is to be gathered, not from any single clause or paragraph, but from the contract as a whole, and if necessary to its proper construction it must be read in the light of the surrounding circumstances

and conditions of the parties at the time it was made. Vol. 24, Ruling Case Law, sec. 744; Heryford vs. Davies, 102 U. S. 235; Chicago Ry. Co. vs. Merchants Bank, 136 U. S. 268.)

Now, applying the principles announced in the authorities *supra,* let us examine the contract upon which the petition in this case is based. What was the purpose and object sought by the parties thereto and what were the particular duties and obligations assumed thereto? It is obvious, in the first place, that the Lumber Company was contracting to acquire the construction of a sawmill fully equipped with machinery and all other apparatus for its successful operation at a price for material, labor, transportation, and all other costs not to exceed thirty-two thousand one hundred and twenty-five ($32,125.00) dollars. The petitioners undertook to furnish this at not to exceed the price specified; but their profits or commissions were limited to fifteen (15%) per cent for working expenses plus ten (10%) per cent upon the gross cost to them. The petitioners also obligated themselves not only to do the work, but to furnish all material which from the contract it was clearly in the minds of the parties that the petitioners would buy on the open market for the purpose of carrying out the contract; for the contract provided that the Lumber Company "has the right at any time to examine the books and requisitions of the petitioners to ascertain the cost of material, machinery, and equipment purchased by them." In other words, the Hills-Corbet Company, as contractors, were

buying for the Lumber Company machinery and equipment under and pursuant to a contract and an obligation on the part of the Lumber Company to repay them the exact advances made on behalf of the Lumber Company plus the stipulated profits or commissions. Now, in a straight sale, it is immaterial what the property sold may have cost the seller. The sole question in such case is the price the purchaser is to pay; but in this contract the supposed purchaser is entitled to know and is given the right to know the price, that is, the amount of money the supposed seller has advanced for it when it was bought on the open market, which advance the supposed purchaser has obligated itself to repay plus expenses and commissions.

In other words, at the time that the contract in question was made, the Hills-Corbet Company had nothing to sell and the Lumber Company did not and could not understand that they were buying anything from Hills-Corbet Company. The Lumber Company was merely employing the Hills-Corbet Company to build and equip their mill according to certain plans and specifications and not to exceed a cost to the Lumber Company of a stated sum. The Hills-Corbet Company accepted this employment and agreed to do the work and, as an incident thereto, to furnish all material including the machinery and apparatus and turn it over complete and ready to run. As a consideration for this the Hills-Corbet Company accepted the obligations of the Lumber Company to pay for same together with their profits thereon in three

certain installments named in the contract. Under such a contract all purchases of material, machinery, etc., made by the Hills-Corbet Company, who were acting merely as the agents or employees, were the purchases of the Lumber Company, and any cash paid by the Hills-Corbet Company out of their own funds was merely an advance by them as agents for their principal and for which they had the obligation of their principal to repay them, plus commissions for their services as such agents or employees.

Conditional contracts of sale are not favored in the law and a contract is never construed as a conditional sale if it admits of any other reasonable construction. (24 Ruling Case Law, sec. 744.) It certainly is just as reasonable to consider and construe the contract in question as providing for a purchase of the machinery and material by the Lumber Company through Hills-Corbet Company as their agents and to consider any money paid by the Hills-Corbet Company as advances made to their principal and secured by their principal's obligation to repay. So construing it, the property in question was never the property of the Hills-Corbet Company, and taking the contract as a whole, we think it reasonably admits of no other construction.

Viewed in this light and the contract as a whole, we think admits of no other construction, the clause in the contract providing that "the title to the apparatus and material herein agreed to be sold shall not pass from the Company until all payments

hereunder shall have been fully paid in cash," amounts to nothing more than an equitable mortgage upon property of the Lumber Company purchased for it by the petitioners as its agents. For it will be observed that the intended retention of title is not to secure the purchase price of the machinery and apparatus alone, but to secure the whole amount to be paid by the Lumber Company under the contract, which included not only the money paid for the machinery and apparatus, but labor, expenses, and profits.

But if it be conceded that when the Hills-Corbet Company purchased the sawmill machinery on the market to use in complying with their contract, they acquired the title in the first place, the same result is reached. They agreed to and did construct the mill and equip it with said machinery and apparatus in consideration of the obligation of the Lumber Company to pay the cost thereof, including labor and all money paid for material, including machinery, plus fifteen (15%) per cent working expenses and ten (10%) per cent profits or commissions. This obligation on the part of the Lumber Company was absolute and unconditional and was a valid and sufficient consideration capable of enforcement. When the mill was completed and finished, it was then the mill of the Lumber Company and everything in it belonged to the Lumber Company and was fully paid for by the obligation that the Lumber Company was under to the Hills-Corbet Company, and the case is governed by the decision of the Supreme Court of the U. S.

(Chicago Ry. Co. vs. Merchants Bank, 136 U. S. 268.)

An instructive case upon the question here at issue is found in Forsman vs. Mace et al., 35th Southern Reporter, p. 372. In that case a logging outfit, including teams, together with the logging contract, which the owners of the outfit had with a third party, was sold for a lump sum, the purchaser obligating himself to pay the lump sum in installments and to carry out the logging contract of the seller. There was a clause in the contract to the effect that the title to the logging outfit and teams should not pass until the whole price was fully paid—that is, the price of the outfit as well as the price for the logging contract. Default was made in the payment of some of the installments and the seller, alleging a conditional sale, sought to retake the logging outfit. The Court held that it was not a conditional sale, notwithstanding the attempted reservation of title and the provision that the title should not pass. The Court said that if it was not a sale of the logging outfit, it was not a sale of the contract. This was absurd, since the logging contract had been taken over and performed. So it was held that the sale was complete notwithstanding the reservation of the title, and that that provision of the contract was merely an equitable mortgage.

In the case of D. A. Tompkins Co. vs. Monticello Cotton Oil Co., 137 Federal, p. 625, there was a contract for the furnishing of machinery and the equipment of a cotton-oil mill. In the contract there was

a provision that the title to the machinery and equipment should not pass until the entire amount due under the contract should be paid. The Court had no difficulty in reaching the conclusion that it was not a conditional sale, but a complete contract in which the furnishing of the machinery was but an incident, and that the attempted reservation of the title was a mere equitable mortgage.

We think, therefore, that the District Court erred in overruling the decision of the referee sustaining the trustee's demurrer to the petition. But certainly the Court was in error in holding the contract a conditional sale in the light of the evidence as to the conduct of the parties under it. Let us briefly examine this conduct. In addition to buying the machinery and equipment called for in the contract of October 31st, 1917, Hills-Corbet Company was also employed by the Lumber Company to purchase further goods aggregating in value nearly six thousand ($6,000.00) dollars. On this machinery and equipment they got the same allowance for expenses and commissions as on the other. There is no pretense that the title to these so-called "extras" (so ~~demonstrated~~ denominated on their bill of particulars) was not the property of the Lumber Company. Now, Hills-Corbet Company in keeping their books, in each and every instance where a purchase was made, charged the Lumber Company with the cost therefor plus their commissions in one general open account, making no distinction whatever between purchases made under the contract and purchases of the "extras." Likewise, all payments

made were simply credited upon the one open account. Again, when several thousand dollars of material is lost on the shipment from Seattle to Craig, no question is raised by either party as to whose goods were lost. These goods were purchased by the Hills-Corbet Company to carry out its contract, and if under the contract there was a conditional sale of the goods, the loss of the goods was the loss of the Hills-Corbet Company and not of the Lumber Company. But, apparently, neither party to the contract considered at that time that the goods were not the goods of the Lumber Company. Again, payments in strict compliance with the terms of the contract ceased at least as early as February 1st, 1918, yet no effort was made by the Hills-Corbet Company to retake the goods or any part of them for a breach of the contract. Mr. Corbet testified (Rec., p. 198) that when the five thousand ($5,000.00) dollars was paid on March 18, 1918, he made no objections to the Lumber Company not living strictly up to the terms of the contract at that time. When asked what objections were made, he answered:

"We wanted more money."

"Q. What did you do when you did not get it?

"A. We asked them to get it for us as soon as possible.

"Q. They did not do it, did they?

"A. No.

"Q. What did you do then?

"A. Kept asking for it.

"Q. They did not make any payment then until July, did they?

"A. I think not.

"Q. And you turned the whole mill over, you say, about May 1st?

"A. It was completed about that time.

"Q. And turned over to them?

"A. I do not know whether they accepted it or not but I think so.

"Q. And they did not pay again until July 19th, and only one thousand ($1,000.00) dollars?

"A. Yes.

"Q. And you accepted that and credited them with it?

"A. Yes.

"Q. On December 8, 1918, they paid you another one thousand ($1,000.00) dollars and that was the last payment, you say, they made?

"A. Yes.

"Q. And you accepted that?

"A. Yes.

"Q. And you never asked for return of this property which you claim you never parted with title to until after bankruptcy proceedings, did you?

"A. Yes; we asked for it while it was still in the hands of receiver.

"Q. It went into the hands of a receiver, did it? That was the first time you asked for it, is it?

"A. I think so."

It appears from the record (pp. 199–201) that a receiver was asked for in the state courts in Washington but nothing was done under it, as the Dis-

trict Court for Alaska took charge of the matter under the bankruptcy law and that the petition the witness referred to was dated the 10th day of March, 1919. In other words, the Hills-Corbet Company treated the property as the property of the Lumber Company and insisted upon payment of moneys alleged to be due them and no suggestion was ever made that the property was theirs until bankruptcy intervened. This conduct is wholly inconsistent with their present claim of a conditional sale, but is wholly consistent with our theory of the contract as a mere building contract.

2d. The contract in this case was neither acknowledged nor recorded as required by sec. 740, Compiled Laws of Alaska, nor was there any renewal of it within one year as required by sec. 743, Compiled Laws of Alaska. Sec. 748, Compiled Laws of Alaska, reads as follows: "The provisions of the foregoing section of this chapter shall extend to all such bills of sale, deeds of trust; other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage in lien of such property." By the provisions of sec. 740, a mortgage of personal property is void against creditors unless executed, acknowledged, and filed, and accompanied by affidavits of good faith.

Under the bankruptcy law, the trustee is in the position of a lienholder by either legal or equitable proceedings—that is, he is in the position of a creditor, and in any event the attempted reservation of title is void as against him. An instructive case upon this proposition is found in the 109th

Pacific, p. 382, Washburn vs. Intermountain Mining Co. In that case, there was a sale of a stamp-mill for the sum of ten thousand ($10,000.00) dollars, one thousand ($1,000.00) dollars of which was paid in cash, and the remaining nine thousand ($9,000.00) dollars on credit. The contract of sale was conditional, it being expressly agreed and understood that title should not pass until the nine thousand ($9,000.00) dollars was paid. The contract, however, further provided that the purchaser should have the right to remove the mill from the mine property of the seller and erect it upon his own mine, which was done. Subsequently, other parties acquired a lien under the lien laws of the State of Oregon, where the case arose and the contest over the mill arose between the seller and these lienholders. The Court held that while it was a conditional sale originally, that the mill had become a part of the purchaser's realty, and although the seller would have had a right to retake the property, it could not do so as against the lienholder on the realty of which the mill had become a part. In this case, there is no question that the status of the trustee is that of the creditor holding a lien. There is also no question but what this property had become a part of the realty, and the trustee was entitled to it.

3d. The undisputed evidence shows the following sums paid under the contract, to wit: Nineteen thousand nine hundred and forty-three dollars and eighty-two cents ($19,943.82), ten thousand five hundred ($10,500.00) dollars, thirty-three hundred

and twenty-four ($3324.00) dollars, and the further sum of at least six thousand ($6,000.00) dollars (Rec., p. 221), making a total of at least thirty-nine thousand seven hundred sixty-seven dollars and eighty-two cents ($39,767.82) paid Hills-Corbet Company by the Lumber Company under the contract. The aggregate amount due on the contract and all extras was thirty-eight thousand and eighty-four dollars and seventy-nine cents ($38,-084.79); that is to say, the cost of the mill and equipment under the contract was not to exceed thirty-two thousand one hundred twenty-five ($32,-125.00) dollars, and the Court found the aggregate value of the extras to be five thousand nine hundred fifty-eight dollars and seventy-nine cents (Rec., p. 76). The machinery and apparatus mentioned in the petition, then, was fully paid for and the title passed to the bankrupt in any event, unless the Court was correct in the interpretation of the evidence it adopted to avoid this effect. The Court, in the first place, applied payments to the discharge of the debts due for extras on the ground that such debt was unsecured while the sums due on the contract were secured debts (Rec., pp. 78 and 89). In other words, the Court in application of payments treated the sums due on the contract as a secured debt, but when it comes to giving relief, treats it as no debt at all, but as a conditional sale, notwithstanding the testimony of Mr. Cloudy that the three checks for three thousand five hundred ($3,500.00) dollars each was paid under the contract as well as the bank credit for six thousand

($6,000.00) dollars more. The Court avoids the effect of this by deducting therefrom and treating as no payment at all some six or seven thousand dollars of money that Hills-Corbet advanced to pay the employees of the Craig Lumber Company, and also refused to allow anything of a credit to the Craig Lumber Company for boarding the employees of the Hills-Corbet Company, the latter of which we will take up in a separate paragraph.

As to the former proposition, however, the error of the Court can be perhaps best demonstrated by a simple illustration:

Suppose A sells a horse to B for one hundred ($100.00) dollars and on a conditional sale that the title is not to pass till the one hundred ($100.00) dollars is paid. B goes to A and pays the one hundred ($100.00) dollars. This, of course, puts an end to the contract and the horse is B's. Suppose, however, the next day A for the accommodation of B pays to C, a creditor of B, fifty ($50.00) dollars for B's account. Can A, subsequently, go in and say to B, "You have not paid for my horse because I used part of the money you paid me to pay your debt to C?" Yet that is exactly what the Court has done in this case.

4th. The petition in this case is based upon the contract and upon nothing else. The contract provided that the expense of all labor should be borne by the Hills-Corbet Company and that the total cost, including labor, should not exceed thirty-two thousand one hundred twenty-five ($32,125.00) dollars. A part of the cost of labor, especially under

the conditions which existed in this case, is the board of the men. You cannot work men without feeding them. The justification for the Court striking out this charge of three thousand three hundred twenty-four ($3,324.00) dollars is found in the testimony of W. W. Corbet (Rec., p. 192) as to a conversation between himself and Mr. Tromble before the contract was executed in which the witness testified that Tromble said that the Lumber Company would assume that expense. No principle of law is better settled than that in the interpretation of a written contract negotiations leading up to it cannot be given as evidence. Yet the Court received this evidence and acted upon it so that the contract for the Craig Lumber Company instead of being limited to thirty-two thousand one hundred twenty-five ($32,125.00) dollars amounted to more than thirty-five thousand ($35,000.00) dollars.

5th. The matter of the application of payments by the Court has already been alluded to. The Court's only excuse or reason for applying the payments first to the liquidation of the extras is that the sums due for them were unsecured while the sums due on the contract were secured. But such a holding upsets the whole theory of the petitioners' case. The most the petitioners were entitled to was to credit the payments on the account at the time they were made.

6th. Upon what possible theory of the law the Court could render the judgment for money against the Bank of Alaska in this proceeding, we confess passes our comprehension. The contest on the

pleadings was solely between the petitioners and the trustee and involved the single question of the ownership of certain machinery and equipment of the sawmill which was in his hands as trustee. The Bank of Alaska, however, had a mortgage upon this property which it had foreclosed in the bankruptcy court. A stipulation is thereupon made that the property may be sold under the mortgage and that the bank should be bound by the final judgment in this case, whether the final judgment be rendered by the District Court for the Territory of Alaska, Division No. 1, or by a higher Court of Appeals, and for that end had entered its appearance in the action for that purpose. It also agreed to pay to the company such sum of money as might be finally found to be due Hills-Corbet Company and by virtue of the contract relied on by said company in their petition, and they gave a bond with the Security Company as surety in the penal sum of twelve thousand ($12,000.00) dollars (Rec., pp. 69–71) to better secure the bank's performance of its stipulation. Thus it will be seen that the Bank of Alaska only entered its appearance in this proceeding for the purpose of being bound by the final judgment between Hills-Corbet Company and the trustee—a contingency which has never arisen. Nevertheless the Court upon having determined that the property described in the petition was the property of Hills-Corbet Company and that there was nine thousand eight hundred twenty-seven dollars and thirty-nine cents ($9,827.39) owing thereon, proceeds at once to enter a money judg-

ment against the Bank of Alaska for that sum together with interest from July 1st, 1918. And to protect itself against an immediate execution, the bank was compelled to join in this appeal and give a supersedeas bond (Rec., p. 329). In our opinion, it needs no further argument to show that this was an arbitrary and illegal proceeding.

We respectfully submit that the judgment of the District Court for Alaska, Division No. 1, shall be reversed and the case remanded, with instructions to dismiss the petition.

JOHN B. MARSHALL,
J. H. COBB,
Attorneys for Appellants.